No. 83-371

In the Supreme Court of the United States

OCTOBER TERM, 1983

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
PETITIONERS

v.

ITT WORLD COMMUNICATIONS, INC., ET AL.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the Government in the Sunshine Act, 5 U.S.C. 552b, which generally requires that agency meetings be open to public observation, applies when members of an administrative agency, who do not constitute a quorum and have not been authorized to conduct official business on the agency's behalf, participate in informal, general discussions with their foreign counterparts concerning issues of mutual interest.

2. Whether suit may be brought in the district court to enjoin allegedly ultra vires action by the Federal Communications Commission, even though jurisdiction to review that agency's orders is vested exclusively in the court of appeals and the precise issue raised in the district court could have been reviewed by this method.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the United States is a petitioner, and Southern Pacific Communications Company and RCA Global Communications, Inc., are respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 699 F.2d 1219. The opinion of the district court (Pet. App. 60a-66a) is not reported. The opinion of the Federal Communications Commission (Pet. App. 70a-87a) is reported at 77 F.C.C.2d 877.

JURISDICTION

The judgment of the court of appeals (Pet. App. 55a-56a) was entered on February 1, 1983. A timely petition for rehearing (Pet. App. 57a-58a) was denied on April 6, 1983. By order dated July 1, 1983, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 3, 1983. The petition was filed on September 2, 1983, and was granted on October 31, 1983 (J.A. 180). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of 5 U.S.C. 552b, 28 U.S.C. 2342, and 47 U.S.C. 402 are set forth in a statutory appendix (App., *infra*, 1a).

STATEMENT

1. The Government in the Sunshine Act, 5 U.S.C. 552b, requires that agency "meetings" generally be open to the public. The term "meeting" is defined (5 U.S.C. 552b(a)(2)) to mean

> the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.

If a covered agency plans to hold a "meeting" as defined in the Act, it must publicly announce, at least one week in advance, "the time, place, and subject matter of the meeting [and] whether it is to be open or closed to the public" (5 U.S.C. 552b(e)(1)). A meeting may be called on shorter notice only if "a majority of the members of the agency determines by a recorded vote that agency business [so] requires * * *" (*Ibid.*). Once a "meeting" has been publicly announced, its format may be changed only by similar recorded vote (5 U.S.C. 552b(e)(2)).

With narrow exceptions, "every portion of every meeting of an agency shall be open to public observation" (5 U.S.C. 552b(b)). The ten exceptions, set forth in Section 552b(c), "are based in most respects on [those] contained in the Freedom of Information Act." S. Rep. 94-354, 94th Cong., 1st Sess. 3 (1975), citing 5 U.S.C. 552(b). An agency may close a meeting (or portion of a meeting) on the basis of these exceptions only by taking a formal, recorded vote (5 U.S.C. 552b(d)(1)). Within one day of voting to close a meeting, the agency must publish the votes cast by each

member and "a full written explanation of its action * * *" (5 U.S.C. 552b(d)(2)). For any closed meeting, the agency must prepare a complete transcript or recording (or, in some cases, a set of detailed minutes) and must permit public inspection of any portion thereof not protected by the exception under which the meeting was closed (5 U.S.C. 552b(f)(1) and (2)).

"[A]ny person" may seek judicial review of an agency's compliance with the Sunshine Act by bringing suit in federal district court. 5 U.S.C. 552b(h)(1). Venue lies in "the district in which the agency meeting is held or in which the agency * * * has its headquarters, or in * * * the District of Columbia." If the court finds that the agency has conducted a meeting in violation of the Act, it "may grant such equitable relief as it deems appropriate," including disclosure of the transcript (if any) or an injunction against future violations. *Ibid.*

2. The Communications Act grants the Federal Communications Commission (FCC) power to regulate "interstate and foreign commerce in communication by wire and radio * * *." 47 U.S.C. 151. As part of this mission, the FCC regulates common carriers of record (non-voice) communications, such as telex, in the international market. A common carrier may acquire facilities to initiate new service only after obtaining from the FCC a certificate of "public convenience and necessity." 47 U.S.C. 214. Yet the Commission has the power to authorize new service only on the American end of an international telecommunications link. Thus, as a practical matter, an international record carrier cannot begin operations until it reaches agreements with government agencies in the foreign countries it hopes to serve.

Respondents ITT World Communications, Inc. (ITT), and RCA Global Communications, Inc., are two of the companies that now "dominate[]" the international record carrier market (Pet. App. 3a). In 1977, the FCC authorized two new companies, Graphnet Systems, Inc.,

and GTE Telenet Communications Corp., to compete with respondents in this field. See *In re Graphnet Systems, Inc.*, 63 F.C.C.2d 402. ITT challenged these authorizations, in part on the ground that the new companies had not yet obtained interconnection agreements with foreign telecommunications agencies, but the Second Circuit rejected this challenge. *ITT World Communications, Inc.* v. *FCC*, 595 F.2d 897, 903 (1979).

Despite the FCC's authorizations, the European agencies, with which respondents had been doing business for years, refused to enter into agreements with Graphnet and Telenet (Pet. App. 4a).[1] On three occasions between October 1979 and October 1980, several members of the FCC held informal discussions with their European and Canadian counterparts that to some extent touched upon this situation. These discussions took place in Europe, as part of an on-going series of conferences among telecommunications administrators known as the "Consultative Process." Pet. App. 78a.

The Consultative Process, begun in 1974, "reflect[ed] the mutual desire of all participants to improve * * * the usage planning of jointly-owned telecommunications facilities in the North Atlantic Region" (Pet. App. 78a). European administrators often misunderstood the basis for FCC regulatory decisions; the Consultative Process originated as a way to help alleviate such misunderstandings, its format—typically described as an "exchange of views"—being dictated by a strong European preference for "informality" (J.A. 80, 87, 92, 159). European and American officials recognized that their views on telecommunications matters, such as the need for standardized facilities (J.A. 128-129) or additional trans-Atlantic cables (J.A. 82), often diverged. The Consultative Process was seen as a useful way "to iden-

[1] In recent years, these companies have obtained operating agreements with some foreign nations, and now offer limited service in competition with respondents.

tify the different approaches being used by the different parties, to narrow differences, and to move toward consensus" (J.A. 78). Consultative Process sessions have never been open to the public. Until October 1979, however, the major U.S. international record carriers were invited to attend (Pet. App. 5a).

In October 1979 a Consultative Process conference was held in Dublin, Ireland. It was attended by three FCC Commissioners and by representatives of the British, Canadian, French, Italian, Swedish, and Swiss telecommunications agencies (Pet. App. 5a-6a; J.A. 109). The Commissioners suggested expanding the agenda to include non-facilities topics such as new carriers and services (Pet. App. 78a). Incumbent U.S. record carriers, including respondents, were excluded from this part of the session.[2] The agenda was expanded to include these topics in the hope that the "consultative process [might] provide a mechanism for increasing cooperation" in the area of new overseas service arrangements (J.A. 52, 80). The Commissioners, in correspondence with their European counterparts, emphasized that they were "not seeking to negotiate the resolution of difference[s] but only to establish a mechanism to facilitate the exchange of information and views" (J.A. 87). Indeed, the Commissioners "often * * * observed [that] the FCC cannot, and should not, negotiate final facilities arrangements;" that the Commission "must remain under U.S. law unhindered to make its best determination about an overall facilities plan;" and that the FCC "cannot be in a position of prejudging or seeming to prejudge any final determinations by reaching prior agreements in an international

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[2] Respondents were likewise excluded from those portions of two subsequent Consultative Process sessions—held in Ascot, England, in February 1980, and Madrid, Spain, in October 1980—during which new carriers and services were discussed. See Pet. App. 6a; J.A. 92, 127-141, 177-179.

forum" (J.A. 78). European participants realized "the limited scope of authority" of the attending Commissioners, explicitly recognizing that "it was not within the terms of the [Consultative Process] to make recommendations, take decisions, or to change the situation" (J.A. 128). Rather, the hope was that, if participants understood others' strongly held views, national agencies in their internal decisionmaking would be more willing to make accommodations, thus achieving a measure of "comity" (J.A. 82, 167), "reciprocity" (*id.* at 64), and "greater cooperation in the introduction of new services" (*id.* at 52).

3. Apparently concerned that the Consultative Process agenda, as expanded in Dublin, "could ultimately lead to greater competition in the provision of international communications services," ITT filed, on October 24, 1979, a rulemaking petition that "in effect challenge[d] [the FCC's] authority to engage in any form of foreign consultative discourse" (Pet. App. 78a-79a). First, ITT asserted that the Commission "lack[ed] authority to participate in" the kind of discussions held in Dublin and asked the FCC to "issue a policy statement delineating the proper scope of [the Consultative Process] and the authority of Commissioners and staff to participate" therein (J.A. 33). ITT correctly noted (*id.* at 34) that the Commission has no authority "to 'negotiate' with foreign governments." While acknowledging that the FCC in the past had "exercised care in consulting rather than negotiating," ITT expressed concern that foreign officials might misinterpret the expanded Dublin consultations "as efforts to negotiate" (*id.* at 35). ITT urged the Commission "expressly [to] disclaim any intention to negotiate with foreign administrations, or to attempt to subject [them] to its regulatory jurisdiction" (*id.* at 47). Furthermore, in the event the Commission decided that its members could permissibly engage in foreign discussions, ITT sought the issuance of

procedural rules to govern the Consultative Process. ITT submitted that its proposed rules comported "with the spirit and the letter" of the Sunshine Act (Pet. App. 72a).[3]

The Commission denied ITT's rulemaking petition (Pet. App. 70a-87a). It stated that it had never "negotiated" with foreign telecommunications officials and that the latter fully understood the limited scope of the attending Commissioners' role (*id.* at 78a-80a). The FCC outlined the background of the Consultative Process, explaining that it "provides a valuable if not indispensable source of information * * * as to future foreign communications needs and the solutions to those needs that will be acceptable to other countries" (*id.* at 79a). By the same token, the FCC noted, the Consultative Process gave the attending Commissioners the opportunity "to explain and promote [the FCC's] statutory mandate" among foreign officials accustomed to legal and economic systems less procompetitive than ours. See *id.* at 81a-82a. This process "[wa]s not a process of negotiation," the Commission explained, because "it recognize[d] that each participant must independently adopt positions" in accordance with its domestic laws (*id.* at 82a). Yet to the extent that the informal discussions "result[ed] in a cooperative telecommunications climate" and "enhance[d] the prospect for foreign acceptance" of FCC-authorized services, the discussions advanced the FCC's "progress toward realization

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[3] ITT's proposed rules would require the FCC to publish 30 days' advance notice of all Consultative Process sessions and of the topics to be discussed there (J.A. 47). Any interested carrier could object to the scheduled topics, propose additional topics, and generally express its views (*id.* at 48). The Commission would be required to indicate its disposition of all comments received. All international discussions would have to be held on the record and be open to the public. And any interested party would be permitted to present its position, orally or in writing, at the Consultative Process. *Ibid.*

of [its] statutory goals [and were thus] a necessary and natural corollary of its international licensing authority" (*ibid.*).

Having decided that its Commissioners could properly take part in foreign discussions, the FCC rejected ITT's request for promulgation of procedural rules. ITT's proposed rules, the Commission noted, were largely based on the assumption that Consultative Process sessions were covered by the Sunshine Act, an assumption the Commission determined to be erroneous (Pet. App. 83a-84a). However, "recogniz[ing] and support[ing] the desirability of conducting its activities, both formal and informal, within public view," the Commission adopted notice and reporting procedures concerning its informal contacts with foreign administrators (*id.* at 84a).

4. While its rulemaking petition was pending (see Pet. App. 12a), ITT filed suit against the Commission in the United States District Court for the District of Columbia. One count of the complaint alleged that the Commissioners were acting ultra vires by engaging in impermissible "negotiations" at the Consultative Process (J.A. 63-69). Another count alleged that Consultative Process sessions were "meetings of [the FCC]" for purposes of the Sunshine Act, and that the Commission had violated the Act by excluding ITT and other carriers from them (*id.* at 69-71). In support of its motion for summary judgment on the latter count, ITT submitted a "Statement of Material Facts" (*id.* at 170-172) alleging that there were no material facts in dispute, and that ITT was entitled to summary judgment because it had been excluded from the Consultative Process and certain statements had been "made by the FCC and its representatives at, or with respect to," those sessions. ITT asked the court "to rely solely on [these] statements," which, in its view, established as a matter of law that "the FCC [was] engaged in the 'conduct or

disposition of official agency business'" at the Consultative Process (*id.* at 164).[4]

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[4] These statements, nine in number, included comments by the full Commission that participation in the Consultative Process flows from the FCC's "duty to authorize international [services] in the public interest" and that "these informal discussions * * * are a necessary and natural corollary of [its] international licensing authority" (J.A. 164-165); a statement by the FCC's General Counsel that "[t]he consultative process may provide a mechanism for increasing cooperation" in the area of new services (*id.* at 168); a comment by the chief of the FCC's Common Carrier Bureau that the Consultative Process was designed to facilitate "meaningful dialogue on matters of international scope" (*id.* at 169); a comment by Commissioner Fogarty that the FCC "really mean[t] business" in seeking to foster competition in overseas services (*id.* at 166); an observation by FCC Chairman Ferris, in colloquy with Senator Hollings at a Senate subcommittee hearing, that the FCC possessed some "leverage in international [facilities] planning" (*id.* at 167); an excerpt from a speech by Commissioner Fogarty in Montreal, Canada, urging foreign administrators to "recognize that [the FCC was] trying to promote competition," and describing the hoped-for European response as a "quid pro quo" (*id.* at 165-166); a comment by Commissioner Lee during an April 1980 FCC meeting that he "wouldn't object to having this very subject on an agenda * * * to see what [the Europeans] would be willing to bargain" (*id.* at 166); and a comment by Commissioner Washburn, during the same FCC meeting, opposing ITT's Sunshine Act request on the ground that public meetings inhibit frank discussion "when [one is] in a negotiating stance abroad" (*ibid.*). In the case of the latter two statements, the context makes clear that the "subject" Commissioner Lee was referring to was not new telecommunications services, but ITT's request that Consultative Process sessions be open to the public (see J.A. 161); and the context makes clear that Commissioner Washburn used the word "negotiating" in a colloquial sense to mean a frank exchange of views. See *id.* at 157-158. Indeed, the subsequent colloquy explicitly affirmed that Consultative Process discussions "are not for the purpose of negotiating operating agreements or entering into explicit tradeoffs with respect to one issue or another" (*id.* at 158).

The district court dismissed the ultra vires count for lack of jurisdiction (Pet. App. 61a-63a). The court "seriously doubt[ed]" that it had subject matter jurisdiction, noting that ITT "sought essentially the same relief in [the] rulemaking proceeding" and that under 47 U.S.C. 402(a) "[j]urisdiction over appeals from FCC orders rests exclusively in the Court of Appeals." Pet. App. 62a. The court saw no need to decide that question, however, because it concluded that ITT lacked standing and that the case was not ripe for review.[5]

The district court granted ITT's motion for summary judgment on the Sunshine Act count, holding that Consultative Process conferences are "meetings of [the FCC]" within the meaning of the Act. The court stated that the Commission "can[not] deny that FCC business is 'conducted'" at those sessions (Pet. App. 65a). The court also determined that the three attending Commissioners "ha[d] been delegated the authority to act for the FCC," asserting that "[i]t is beyond dispute that [they were] authorized to submit recommendations to the full Commission" and that "[i]t cannot be contested that the [Consultative Process] is designed to effectuate the decision-making process" (*id.* at 66a). The court enjoined the FCC to "comply with the * * * Sunshine Act * * * forthwith" (*id.* at 59a), although it stayed its order for three weeks to permit a previously scheduled Consultative Process session to be held in Madrid,

[5] The district court construed ITT's ultra vires claim to be based on the Logan Act, 18 U.S.C. 953, which makes it a crime for unauthorized persons to negotiate with foreign governments, and held that the State Department alone has standing to complain of that statute's violation (Pet. App. 63a). The court also concluded that the ultra vires claim would not be ripe until the two new carriers had been accepted by foreign telecommunications agencies, at which time ITT could "object through the formal rulemaking process" (*ibid.*). The court of appeals reversed these two rulings (*id.* at 17a-21a). Neither is presented here.

Spain, provided that the session was "memorialized in transcript form" (*id.* at 68a).[6]

5. The court of appeals consolidated ITT's petition for review of the order denying rulemaking with cross-appeals from the district court's judgment. It reversed the district court's dismissal of the ultra vires count (Pet. App. 13a-21a), reversed in part the FCC's denial of rulemaking (*id.* at 45a-53a), and held that the Sunshine Act applies to the Consultative Process (*id.* at 34a-45a).

a. Conceding that "[a] strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rulemaking petition and its *ultra vires* count were indeed identical," the court of appeals determined that the issues were actually "very different" (Pet. App. 14a). Whereas the rulemaking petition, as the court of appeals read it, asked the FCC to declare "that 'negotiation' [was] outside the scope of [its] authority," ITT's ultra vires count alleged "that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so" (*ibid.*). The court viewed the rulemaking record as "manifestly inadequate" to permit appellate review and concluded that ITT's "colorable *ultra vires* claim can therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court" (*id.* at 15a).

b. Again citing the "patent[ ] inadequa[cy]" of the record, the court of appeals reversed the Commission's denial of ITT's rulemaking petition (Pet. App. 48a). The court, however, declined to follow the "normal course" of simply remanding to the agency with instructions "to

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[6] ITT also sought disclosure under the FOIA of certain documents related to the Consultative Process (see Pet. App. 71a n.1). The district court ordered disclosure of the documents (*id.* at 63a-65a), but the court of appeals reversed as to all but two of them (*id.* at 21a-34a). The FOIA question is not presented here.

consider the issues further and develop an adequate record for judicial review," noting that it was remanding the ultra vires count to the district court with instructions to do precisely the same thing (*id.* at 51a). The court allowed that there might be some "tension in such a 'double remand.'" Indeed, it acknowledged that "the practical effect of [its] decision [was] fraught with the potential for duplication, conflicting resolutions, and further delay" (*ibid.*). Yet it concluded that these difficulties were "largely of the Commission's own making," and suggested that the FCC minimize them "through the simple expedient of staying further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (*id.* at 51a-52a).

c. Turning to the Sunshine Act, the court of appeals held that Consultative Process sessions were "meetings of [the FCC]" as defined in 5 U.S.C. 552b. First, the court determined that the attending Commissioners were a "subdivision * * * authorized to act on behalf of the agency." 5 U.S.C. 552b(a)(1). The court acknowledged (Pet. App. 36a) that a subdivision of the FCC can properly be authorized to act on its behalf only by an express delegation of power pursuant to 47 U.S.C. 155(d)(1). The court likewise acknowledged (Pet. App. 36a) that no such delegation of power had been made to the Commissioners attending the Consultative Process. But the court inferred that such authority had nevertheless been granted—unofficially and in violation of the Communications Act—reasoning that the Commissioners attended "in their 'official roles,'" that "their goal [was] to build a 'consensus' that will 'lead ultimately to operating agreements for ITT's competitors,'" and that "they convey the information and views 'exchanged' at the meetings to the full Commission for its consideration" (*id.* at 37a).

The court of appeals also concluded that the Consultative Process discussions were "deliberations [that] de-

termine or result in the joint conduct or disposition of official [FCC] business." 5 U.S.C. 552b(a)(2). The court remarked (Pet. App. 37a) that the term "deliberations" might be "read narrowly to encompass solely the internal process of weighing and examining proposals that precedes a formal decision," but it did not explain why it declined to adopt that reading or how the term could be read otherwise. The court relied heavily on a sentence in the legislative history of the Sunshine Act stating that the term "meeting" was meant to encompass "hearings and meetings with the public" (*id.* at 38a, quoting S. Rep. 94-354, *supra*, at 18), and concluded that the FCC "ha[d] advanced no reason to distinguish" Consultative Process discussions from such gatherings (Pet. App. 38a). Finally, the court deemed the Consultative Process to "involve[ ] agency business of the first import" because the information gathered there "is essential in [the FCC's] deliberations regarding the future structure of international communications" and because the sessions are designed to achieve a "'consensus' and 'favorable climate' with foreign administrations" on the subject of new services (*id.* at 39a).

SUMMARY OF ARGUMENT

I. Congress enacted the Sunshine Act to open agencies' "decisionmaking processes" to public view, yet at the same time to protect agencies' ability to discharge their regulatory responsibilities efficiently. That being Congress's goal, common sense suggests that the Act's open meeting rules should apply only to relatively formal sessions at which agency members with decisionmaking authority deliberate over concrete proposals for action and reach fairly firm views about the pending proposals. Common sense likewise suggests that the meetings at which these events occur must be conducted by the agency, for otherwise the agency would be in no position to ensure compliance with the Act's various strictures.

Happily, the statute's language and legislative history vindicate this common sense view. The Act applies only to "meeting[s] of an agency," as defined, and its openmeeting rules thus come into play only if a gathering satisfies four discrete tests. The people who attend must constitute a quorum of the agency or of a "subdivision authorized to act on [its] behalf." 5 U.S.C. 552b(a)(1). The attending members must engage in "deliberations," that is, "consideration and discussion of alternatives before reaching a decision." *Webster's New World Dictionary* 373 (2d college ed. 1974). The deliberations must "determine or result in the joint conduct or disposition of official agency business," that is, must involve "discussions which effectively predetermine official actions." S. Rep. 94-354, *supra*, at 19. And the "meeting" must be a "meeting of [the] agency," that is, must be run by the agency and be within its control.

The Consultative Process sessions did not satisfy any of these tests. First, the Commissioners who attended were neither a quorum of the FCC nor a quorum of a subdivision authorized to act on its behalf. Under the Communications Act, the Commission may authorize a subdivision to act on its behalf only by a formal delegation of power, and it is conceded that no such delegation was effected here. Second, the Consultative Process discussions did not constitute "deliberations," for they involved, not a formal evaluation of concrete proposals, but an informal exchange of views on extremely general topics, and had no relationship to any FCC decision, pending or prospective. Third, the discussions did not "predetermine official actions," both because they did not involve any matter pending or likely to arise before the FCC, and because, given their informal nature, they could not have caused the attending Commissioners' views on any issue to become "fixed." Finally, even if the Consultative Process sessions were "meetings," they were not "meetings of [the FCC]." The confer-

ences were held on foreign soil, hosted by foreign officials, and attended by foreign representatives who outnumbered the Commissioners and equalled them in rank. Under these circumstances, the attending Commissioners were in no position to dictate the terms of the gatherings, to decide unilaterally whether they would be open to the public, or to decree that they be governed by United States law. Faced with foreign objections to American open-meeting rules, the Commissioners would have been forced to choose between forgoing the meetings or violating the Sunshine Act, a Hobson's choice that Congress cannot possibly have envisioned.

II. The court of appeals likewise erred in sustaining district court jurisdiction of ITT's ultra vires claim. ITT presented a substantially identical ultra vires argument to the FCC, and the Commission fully addressed that argument in its order denying rulemaking. It is hornbook administrative law that review of the FCC's order was committed exclusively to the court of appeals. In holding otherwise, the court below has licensed collateral attacks on agency orders, in contravention of this Court's decisions, that will seriously disrupt the administrative process.

ARGUMENT

I. THE CONSULTATIVE PROCESS SESSIONS WERE NOT MEETINGS OF THE FCC, AND THUS WERE NOT SUBJECT TO THE SUNSHINE ACT'S OPEN MEETING REQUIREMENTS

In passing the Sunshine Act, Congress struck a balance between two principles. On the one hand, it declared that "the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government." Pub. L. No. 94-409, § 2, 90 Stat. 1241. On the other hand, it stressed that enhanced public access must be accomplished "while protecting * * * the ability of the Government to carry out

its responsibilities" (*ibid.*). Congress endeavored to accommodate these principles by crafting detailed definitions of the Act's operative terms. These definitions, like those contained in the Freedom of Information Act, indicate that, while "Congress undoubtedly sought to expand public rights of access to Government information[,] * * * that expansion was a finite one." *Forsham* v. *Harris*, 445 U.S. 169, 178 (1980). The question presented here, accordingly, is not to be resolved, as the court of appeals evidently believed, by generalized incantations about the Act's "broad sweep" (Pet. App. 39a, 44a) or its "presumption of openness" (*id.* at 40a, 42a, 43a, 44a). The Sunshine Act "sweeps" only as broadly as its words, construed in light of English usage and legislative intent, permit.

The Sunshine Act applies to "meeting[s] of an agency." 5 U.S.C. 552b. It defines "agency" to mean a "collegial body" consisting of two or more presidential appointees, including "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. 552b(a)(1). It defines "meeting" to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business." 5 U.S.C. 552b(a)(2). Thus, a gathering attended by agency members is covered by the Sunshine Act only if four distinct elements are present: (1) the attending members must constitute a quorum of the full agency or of a "subdivision thereof authorized to act on behalf of the agency"; (2) the attending members must engage in "deliberations"; (3) the deliberations must "determine or result in the joint conduct or disposition of official agency business"; and (4) the gathering must be a "meeting of [the] agency." Absent any one of these elements, the Sunshine Act's openmeeting rules do not apply. Not one of these prerequisites was met here.

A. The Consultative Process sessions were attended neither by a quorum of the FCC nor by a quorum of a subdivision authorized to act on its behalf

1. It is undisputed that a "quorum" of the Commission—*i.e.*, "the number of individual [FCC] members required to take action on [its] behalf"—was not present at any Consultative Process discussion. At all relevant times, the Commission had seven members, and a quorum was four. 47 U.S.C. 154(h).[7] No more than three Commissioners, however, ever participated in the Consultative Process. As the court of appeals noted (Pet. App. 2a, 36a), the three attending Commissioners were also members of, and represented a quorum of, the "Telecommunications Committee," which is a subdivision of the FCC. But it is clear that these Commissioners were not "authorized to act on behalf of the [FCC]" at those gatherings.

The Communications Act permits the Commission to delegate certain of its functions to a "panel of commissioners [or] an individual commissioner." 47 U.S.C. 155(d)(1).[8] Such delegation of authority may be made only "by published rule or by order," and "[a]ny such rule or order may be adopted, amended, or rescinded only by a vote of a majority of the members of the Commission then holding office" (*ibid.*). The Telecommunications Committee is one of the FCC's two standing committees (47 C.F.R. 0.4). The Commission by rule has delegated specific, limited functions to that Committee, *i.e.*, the authority to act upon applications by common carriers for certificates of public convenience (47 U.S.C. 214) and the authority to act upon certain

[7] Effective July 1, 1983, the Commission's membership was reduced to five, thus reducing the size of a quorum from four to three. Pub. L. No. 97-253, tit. V, § 501(b), 96 Stat. 805.

[8] Section 155(d)(1) was renumbered as Section 155(c)(1) in 1982. See Pub. L. No. 97-259, § 105(b), 96 Stat. 1091 (to be codified at 47 U.S.C. 155(c)(1)).

applications for radio construction permits (47 U.S.C. 319). See 47 C.F.R. 0.215. It has never been suggested that the attending Commissioners performed either of these functions at the Consultative Process. Nor has the FCC, "by published rule or by order," delegated the Telecommunications Committee authority to perform any other function there. The attending Commissioners, therefore, having received no delegation of authority under 47 U.S.C. 155(d)(1), were not "authorized to act on behalf of the [Commission]" at those sessions, and, had they purported so to act, their actions would have been void.

2. The court of appeals, while acknowledging that the attending Commissioners had received no express delegation of authority, nevertheless concluded (Pet. App. 36a) that the Commission had conferred such authorization unofficially. The court inferred a sub rosa delegation of authority from the facts that the Commissioners attended in their "official roles," that their goal was to "build a 'consensus,'" and that they "convey[ed] the information and views 'exchanged'" to the full Commission upon their return (*id.* at 36a-37a). This reasoning cannot withstand analysis.

a. To begin with, the court of appeals cited no authority (and we know of none) for the proposition that, where there exists an express "delegation of powers" provision in an agency's organic statute, the agency may nevertheless authorize members to act on its behalf by informal and unofficial means. Indeed, the court of appeals assumed (Pet. App. 36a) that the FCC had conferred the supposed "authorization" illegally, and proceeded to direct that the attending Commissioners henceforth play their role in the Consultative Process "only pursuant to a proper and precise delegation of authority from the Commission" (*id.* at 53a). The court of appeals' assumption of an illegal delegation, based entirely on inference, is wholly contrary to the presump-

tion of regularity normally accorded agency action. See *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926).

b. Even if an unofficial delegation of authority were possible under the Communications Act, the language and operation of the Sunshine Act indicate that a "subdivision" is not "authorized to act on behalf of the agency"[9] absent officially delegated power. The word "subdivision" connotes a body that has been officially created and that has well-defined duties. Indeed, a leading treatise on the Sunshine Act concludes that, "[a]t a minimum, a subdivision must have a specified membership and fixed responsibilities; an informal working group authorized to report back to the body is not a subdivision." R. Berg & S. Klitzman, *An Interpretive Guide to the Government in the Sunshine Act* 3 (1978) (hereinafter cited as *Interpretive Guide*). Because the term "subdivision" betokens a reasonable level of formality, its use presupposes an official delegation of power.

The quorum requirement likewise suggests that a "subdivision" must be an entity empowered to take official action capable of binding the agency, rather than a loose group informally assigned to assist it in some way. A quorum, obviously, is not necessary to perform duties of the latter sort, and it is difficult to see why Congress included the quorum rule if it intended the

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[9] Earlier versions of the Sunshine Act, like the version enacted, required that a subdivision be "authorized to act on behalf of the agency" before a "meeting" could occur. Both bills before the Conference Committee contained this requirement. See S.5, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(1) (1976). Previous drafts did the same. See, *e.g.*, H.R. 5075, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 9868, 94th Cong., 1st Sess. § 4(a) (1975). The legislative history nowhere discusses the meaning of this phrase.

Act to cover groups that discharge only such tasks. Rather, a quorum is needed to take formal action that at some stage will require a vote. The quorum requirement thus makes perfect sense if the Act is construed to reach only those agency subdivisions possessing officially delegated powers.

The "collegiality" requirement, finally, militates against the court of appeals' "informal authorization" theory. For Sunshine Act purposes, a "subdivision," like its parent agency, must function as a "collegial body." See *Interpretive Guide* 3. A "collegial" body is one "with authority or power shared equally among colleagues." *Webster's New World Dictionary* 279 (2d college ed. 1974). Agency members act "collegially" when they debate and vote on proposals with the majority view prevailing, actions of the sort for which an official delegation of authority is needed. It is hard to see how agency members act "collegially" when they attend an informal gathering in Europe and report on what they heard. Such action is not predicated on an "equal sharing" of power; indeed, it has nothing to do with the exercise of power at all.[10].

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[10] In holding that "unofficial authorization" sufficed, the court of appeals reasoned (Pet. App. 36a) that "[t]he applicability of the Sunshine Act manifestly cannot turn on whether an agency has in fact followed proper procedures for delegating authority to a subdivision, for the requirements of the Act could otherwise be evaded at will." This reasoning is spurious. An agency will have little incentive to make improper delegations of power, since, if its members purport to take official action in reliance thereon, their actions will be void and may be set aside. On the other hand, if the "unofficially authorized" members do not purport to take official action, but merely assist the agency informally in some way, any official action subsequently taken will be fully subject to the Sunshine Act's constraints. Besides, an agency willing to delegate authority to escape the Act's strictures need not resort to the sort of skulduggery hypothesized by the court of appeals, for agencies have at their disposal perfectly legal methods of accomplishing that result. The agency,

c. Even if an informal delegation of authority were sufficient for Sunshine Act purposes, the court of appeals offered no convincing explanation of what it was that the attending Commissioners were unofficially authorized to do. ITT consistently has asserted that the Commissioners were "negotiating" with their European counterparts. All parties to the case agree, however, that the FCC has no authority to "negotiate" with foreign governments (see page 6, *supra*), and an agency obviously cannot delegate authority that it does not possess. The Commission (Pet. App. 80a & n.5, 83a; J.A. 121-122) and the attending Commissioners (J.A. 175) repeatedly stated that the latter were not authorized to act for the FCC in any way, but the court of appeals dismissed these averments as "vague" and "conclusory" (Pet. App. 45a n.179). The court noted (*id.* at 36a-37a) that the Commissioners attended in their "official roles" and sought to "build a 'consensus,'" but it is hard to construe this as "taking action on behalf of the FCC." At bottom, the court of appeals seems to have based its inference of unofficial authorization on the fact that the attending Commisioners "convey the information and views 'exchanged' at the [Consultative Proc-

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for example, could authorize a single member to act on its behalf. See 5 U.S.C. 552b(a)(2) (defining "meeting" to mean "the joint conduct" of agency business); S. Rep. 94-354, *supra*, at 17 (indicating that the Act does not apply where only one agency member is present). Cf. 47 U.S.C. 155(d)(1) (permitting FCC to "delegate any of its functions * * * to * * * an individual Commissioner"). Or the agency could authorize employees, rather than members, to act for it. See 5 U.S.C. 552b(a)(1) & (2) (defining "agency" as a collegial body headed by "two or more * * * members" appointed by the President, and defining "meeting" as the deliberations of a quorum of "members"). Cf. 47 U.S.C. 155(d)(1) (permitting FCC to "delegate any of its functions * * * to * * * an employee board, or an individual employee"). While Congress recognized such possibilities (see S. Rep. 94-354, *supra*, at 17), it chose not to make the Act's coverage absurdly broad solely to preclude all chance of avoidance.

ess] to the full Commission for its consideration" (*id.* at 37a). The legislative history plainly shows, however, that this does not constitute "act[ion] on behalf of the [FCC]" either.

Congress frequently manifested its understanding that a "subdivision" for Sunshine Act purposes "need not have authority to take agency action which is final in nature." S. Rep. 94-354, *supra*, at 17. "It is not sufficient for the purposes of open government," the Senate Report explained, merely to "have the public witness final agency votes," or to have open meetings be "reruns staged for the public after agency members have discussed the issue in private and determined their views." *Id.* at 18. The Report accordingly says that "[p]anels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required * * * to open their meetings to the public." *Id.* at 17. *Accord*, H.R. Rep. 94-880 (Pt. I), 94th Cong., 2d Sess. 7 (1976).

The district court (Pet. App. 66a) and the court of appeals (*id.* at 39a) seized upon this language to support an inference of delegation, on the theory that the attending Commissioners were "authorized to submit recommendations" to the FCC. But it seems clear that the Senate Report, in referring to "submi[ssion of] recommendations," had more in mind than "conveyance of information and views." The Report speaks of subdivisions authorized "to conduct hearings" and "to submit recommendations, preliminary decisions, or the like." The conduct of hearings and the submission of preliminary decisions are well-recognized forms of agency action, and both possess a high degree of formality. Employing the principle of noscitur a sociis (see *National Muffler Dealers Ass'n, Inc.* v. *United States*, 440 U.S. 472, 475, 487-488 (1979)), it would seem that "submit-

[ting] recommendations" likewise denotes a step more formal than simply "coming back and telling the Commission what happened." Indeed, the leading treatise on the Sunshine Act concludes that, "where a committee of members has been directed to draw up and submit an informal recommendation to the full collegial body, which recommendation is then open to full consideration by the body, it is hard to regard such an assignment as an authorization to act on behalf of the agency in any meaningful sense." *Interpretive Guide* 2-3. See *id.* at 3 (concluding that "an informal working group authorized to report back to the [agency]" is not a subdivision authorized to act on its behalf).

By basing an inference that the attending Commissioners were "unofficially authorized" to act for the FCC on a finding that "they convey the information and views 'exchanged' * * * to the full Commission" (Pet. App. 37a), the court of appeals has twisted both the legislative history and the English language out of recognizable shape. Authorization "to act on behalf of an agency" means more than to "be present," to "discuss agency matters," or to "report what transpired." If it did not, agency members would be deemed to have "acted on behalf of the agency" each time they went to a lecture, attended a briefing session, or participated in a continuing legal education seminar. High-level government officials have a duty to educate themselves about their work, and Congress can scarcely have intended that the Sunshine Act will apply—without more—unless they remain mute about what they learn.

d. Finally, the court of appeals' "unofficial delegation" theory portends practical problems of no small scope. If the Sunshine Act were satisfied by unofficial authorization or by authorization in contravention of governing statutes and rules, a colorable open-meeting claim could be asserted when agency members engage in any activity related to their regulatory tasks. Per-

sons asserting claims of sub rosa authorization would predictably demand the right to discover all information bearing on the question, and such evidentiary proceedings would obviously create potential for harassment and interference with the agency's proper functioning. Such a doctrine, moreover, would make it impossible to administer the Sunshine Act in accord with Congress's intent. The statute, with its requirements that the time, place, subject matter, and open-or-closed status of a meeting be announced *in advance*, is predicated on the assumption that an agency can know ahead of time whether a gathering will be a "meeting" or not. If this determination hinges on an appellate court's inference about whether attending members, despite their repeated protestations to the contrary, have been endowed with sub rosa delegations of authority, the Act's prospective rules will be unadministrable.

B. The Consultative Process sessions did not involve "deliberations"

The Sunshine Act defines "meeting" to mean "the deliberations" of a quorum. 5 U.S.C. 552b(a)(2). The court of appeals itself suggested a useful definition of the word "deliberations," explaining (Pet. App. 37a) that it might be read "to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency." The court refused to adopt that construction, or to propose any other, and declined to explain why. Yet the language and legislative history of the statute show that the reading the court rejected is correct.

The word "deliberations" is defined as "consideration and discussion of alternatives before reaching a decision." *Webster's New World Dictionary* 373 (2d college ed. 1974); see *Black's Law Dictionary* 384 (5th ed. 1970). As used in the Sunshine Act, the term presupposes a "discussion which is sufficiently focused on discrete proposals or issues" to cause participants to form

reasonably firm views (*Interpretive Guide* 9). The term thus excludes the furnishing of information or the exchange of views when no concrete proposal is presented for decision.

The evolution of the statute's language shows that "deliberations" should be read in this narrow, dictionary sense. The House bill, as reported by the Judiciary Committee, defined "meeting" as "an assembly or simultaneous communication" concerning agency business. H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). The definition was amended on the floor to read, "a gathering to jointly conduct * * * agency business," and passed the House in that form. 122 Cong. Rec. 24203 (1976). The Senate bill originally defined "meeting" as "any procedure by which official agency business is considered or discussed." S. 5, 94th Cong., 1st Sess. § 201(a) (1975); see 121 Cong. Rec. 244 (1975). The definition was subsequently revised to read, "a gathering, electronically or in person, [which] results in the consideration" of agency business. S. 5, § 201(a), S. Comm. Print No. 2, 94th Cong., 1st Sess. (1975). As reported by the Senate Government Operations Committee, however, the definition was amended to read much as it now does, *i.e.*, "the *deliberations* of [a quorum] where such *deliberations* concern the joint conduct or disposition of official agency business." S. 5, 94th Cong., 1st Sess. § 201(a) (1975) (emphasis added). The Senate Report explained that this redrafting was designed "to exclude many discussions which are informal in nature." S. Rep. 94-354, *supra*, at 10. Indeed, the Report states (*id.* at 18) that the word "deliberations" was "carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of [the Act]." The Conference Report, with a modification not relevant here, adopted "the Senate definition, as explained in the Senate report." S. Conf. Rep. 94-1178, 94th Cong., 2d Sess. 11

(1976). In consciously choosing the word "deliberations" in lieu of words like "gathering," "assembly," "procedure," or "communication," Congress surely suggested that the term should be construed, in the court of appeals' words, "to encompass solely the internal process of weighing and examining proposals that precedes a formal decision by the agency."[11]

The Consultative Process discussions, as the court below recognized, cannot possibly be held to constitute "deliberations" under this standard. Those talks consisted, not of a formal evaluation of concrete proposals, but of an informal exchange of views on extremely general subjects. See pages 4-5, *supra*. The information the Commissioners gathered did not precede, and had no relationship to, any formal decision, pending or prospective.[12] Indeed, to the extent that the Consulta-

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[11] The use of the term "deliberations" elsewhere in the Sunshine Act is consistent with this conclusion. The Act provides (5 U.S.C. 552b(a)(2)) that "the term 'meeting' means * * * deliberations * * *, but does not include deliberations required or permitted by subsection (d) or (e)." The "deliberations" referred to in subsections (d) and (e), significantly, are all of a formal, evaluative, decision-oriented sort. See, *e.g.*, 5 U.S.C. 552b(d)(1) (providing that an agency may close a meeting "only when a majority * * * votes to take such action," and specifying the procedure for such vote); 5 U.S.C. 552b(d)(2) (providing that, upon request of an interested party, "the agency * * * shall vote by recorded vote whether to close" a meeting); 5 U.S.C. 552b(d)(4) (stating that an agency "may provide by regulation" for the closing of certain meetings); 5 U.S.C. 552b(e)(2) (providing that an agency may change a meeting's format only if it "determines by a recorded vote that agency business so requires").

[12] The court of appeals suggested that the information gathered at the Consultative Process "is essential in [the FCC's] deliberations regarding the future structure of international telecommunications" (Pet. App. 39a). But the fact that an event furnishes information useful in *future* deliberations does not mean that the event *itself* involves deliberations. Reading docu-

tive Process related to any FCC decision at all, it related to the Telenet and Graphnet decisions that the Commission had already made, decisions whose procompetitive rationale the attending Commissioners sought to explain, and whose procompetitive effects they urged their foreign counterparts to help realize.

C. The Consultative Process sessions did not "determine or result in the joint conduct or disposition of official agency business"

The Sunshine Act defines "meeting" to include agency deliberations only "where such deliberations determine or result in the joint conduct or disposition of official agency business." The legislative history (see page 22, *supra*) makes clear that the reach of this language is not confined to gatherings at which final votes are taken. Yet it is equally clear that its reach does not extend to informal sessions, like those involved here, where agency business is simply discussed.

1. The evolution of the statutory language reveals a deliberate effort by Congress to narrow the categories of gatherings subject to the Act's openmeeting rules. The Senate bill, as passed by that chamber, covered deliberations that "concern the joint conduct or disposition of official agency business." S. 5, 94th Cong., 1st Sess. § 4(a) (1975). Early versions of the House bill read the same. See, *e.g.*, H.R. 9868, 94th Cong., 1st Sess. § 4(a) (1975); H.R. 10315, 94th Cong., 1st Sess. § 552b(a)(2) (1975). The House Government Operations Committee, however, amended the formula by omitting the word "official." H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). The Judiciary Committee followed suit. H.R. 11656, 94th Cong., 2d Sess. § 552b(a)(2) (1976). Representative Horton noted that this omission

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ments or inspecting facilities may also furnish such information, but those activities can hardly be termed "deliberations."

had the effect of "immediately broaden[ing] the range of member conversations which [the bill] covered." 122 Cong. Rec. 24203 (1976). The definition was somewhat tightened on the floor by defining "meetings" with reference to their purpose, but in the definition as it passed the House—"a gathering to jointly conduct or dispose of agency business"—the word "official" was still left out. 122 Cong. Rec. 24203 (1976).

The Conference Report adopted the Senate definition, with its "official business" gloss, but made one significant modification. Whereas S. 5 had referred to deliberations that "*concern* the joint conduct or disposition of official agency business," the statute as enacted refers to deliberations that "*determine or result in* the joint conduct or disposition of official agency business." The Conference Report highlights, but does not explain, this change. See S. Conf. Rep. 94-1178, *supra*, at 11. Representative Fascell, however, a member of the Conference Committee and one of the bill's chief sponsors, said that the substituted language was "intended to permit casual discussions between agency members that might invoke the bill's requirements under the less formal 'concern' standard." 122 Cong. Rec. 28474 (1976). See *Interpretive Guide* 7 (noting that the substituted language "can only be interpreted as intending some limiting and narrowing effect").

2. The committee reports show that Congress, in restricting the definition of "meeting" to deliberations that *determine or result in* the conduct or disposition of *official* agency business, intended to reach only formal sessions where members' positions on a matter become fixed. The Senate Report states that the key consideration is whether "agency members have discussed the issue * * * and *predetermined* their views," that an agency's deliberations "cross over the line" and become a "meeting" when members "engage in discussions

which effectively *predetermine* official actions." S. Rep. 94-354, *supra*, at 18, 19 (emphasis added). A leading treatise on the Sunshine Act likewise concludes that "the controlling distinction is between discussions which 'effectively predetermine official actions' and those which do not." *Interpretive Guide* 6. See *id.* at 8.

At the same time, the legislative history shows that informal, exploratory talks are outside the Act's scope. The Senate Report says that "meetings" exclude "informal and preliminary" discussions, and that "[i]t [was] not the intent of the bill to prevent * * * agency members * * * from engaging in informal background discussions which clarify issues and expose varying views." S. Rep. 94-354, *supra*, at 19.[13] The test is whether the discussion is "decision-oriented," that is, "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." *Interpretive Guide* 9 & n.16.

3. There can be little question that the Consultative Process discussions did not constitute "meetings" under this standard. It is no doubt true, in the court of appeals' words (Pet. App. 38a), that the discussions "involve[d] agency business," in the sense that the Commissioners attended as Commissioners, rather than as tourists, and that they broached matters of importance to the FCC. But it is not sufficient that discussions "involve" or "concern" agency business. The statute says

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[13] The quoted passage makes this point (S. Rep. 94-354, *supra*, at 19) by reference to a three-member agency, but "the passage necessarily has broader application, since there is nothing in the statute which supports a special definition of 'meeting' for agencies where two members make up a quorum." *Interpretive Guide* 6. The court of appeals (Pet. App. 41a n.163) so understood the passage.

that they must "determine or result in the joint conduct or disposition of official agency business."

The Consultative Process discussions did not do that. The court below did not identify any action of the FCC, or any position of its individual Commissioners, that became "predetermined" or "fixed" at those gatherings. Nor did the court find the discussions to have focused on any concrete proposal pending or likely to arise before the agency. Rather, the Consultative Process sessions involved precisely the sort of "informal background discussions" that, according to the Senate Report, the Sunshine Act was not meant to cover. Those attending the gatherings constantly referred to—indeed, repeatedly insisted upon—the sessions' "informality." See pages 4-5, *supra*. And, to the extent that the Commissioners sought the views of foreign administrations, it was as a background for future FCC decisionmaking, decisionmaking that would in the normal course itself be subject to the Act's openmeeting rules.

4. In support of its conclusion that the Consultative Process "determined or resulted in the joint conduct or disposition of official [FCC] business," the court of appeals asserted that "[t]hese encounters play an integral role in the Commission's policymaking processes in at least two ways" (Pet. App. 38a). First, the court observed (*id.* at 38a-39a) that "the meetings are an important means for gathering information and opinions from foreign administrations" and that this information would be useful in future FCC deliberations. This observation, while correct, is irrelevant to the proposition the court set out to prove. The fact that discussions yield useful data for future decisionmaking—"informal background discussions" do just that—does not mean that they "effectively predetermine official actions" (S. Rep. 94-354, *supra*, at 19).

Second, the court of appeals found (Pet. App. 39a) that the FCC had chosen the Consultative Process "as

the vehicle to assist Graphnet and Telenet in obtaining interconnection agreements." However, assuming arguendo the accuracy of this finding, such efforts on the part of the attending Commissioners did not "predetermine" any FCC position or relate to any matter pending or likely to arise before it, since the Commission had already issued final decisions authorizing Graphnet and Telenet to enter the trans-Atlantic market.[14] Rather, the Commissioners sought merely to explain the basis for, and thus facilitate the implementation of, decisions the FCC had previously made. Although the court of appeals believed that the "broad sweep of the Sunshine Act does not support a distinction between an agency's *predecisional* activities and its *postdecisional* efforts to implement, interpret, and

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[14] In its Brief in Opposition, ITT asserts (at 23 & n.17) that the Consultative Process discussions may have touched on at least one matter that was "likely to arise before" the FCC, since, under the terms of the Commission's authorizations to Telenet and Graphnet (see *ITT World Communications*, 595 F.2d at 902), any operating agreements they reached with European administrations would "require [FCC] approval." This assertion is misleading. The Commission in authorizing Telenet and Graphnet did conclude that its "regulatory needs [could] be adequately satisfied by conditioning [their] authorizations [on] the execution and filing of satisfactory agreements prior to initiation of these services, rather than prior to their authorization." 63 F.C.C.2d at 408. The filing of such agreements, however, was merely a reporting requirement, not a substantive condition of licensing (*In re International Relay, Inc.*, 77 F.C.C.2d 819, 826 (1980)), and in reviewing the agreements the FCC would be performing only a routine oversight function. (The Commission has since eliminated, effective May 1980, the requirement that operating agreements be filed prior to the carrier's commencing service (77 F.C.C.2d at 825-828)). At all events, any link between the generalized discussion of "new carriers and services" held at the Consultative Process, and the particularized terms of hypothetical operating agreements foreign administrations might sign with Telenet or Graphnet, was utterly remote and speculative.

promote its policies" (Pet. App. 39a), that belief was ill-founded. The goal of the Sunshine Act, as expressed in its preamble, was to give the public the fullest practicable information about "the decisionmaking processes" of the government. Pub. L. No. 94-409, § 2, 90 Stat. 1241. The legislative history consistently echoes this theme. See, *e.g.*, S. Rep. 94-354, *supra*, at 11, 17, 18. One does not need a dictionary to recognize that "postdecisional" efforts to explain a decision are not part of "the decisionmaking process." See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 151-152 (1975).

5. Finally, the court of appeals (Pet. App. 38a) sought support in the legislative history for its conclusion that the Consultative Process "determined or resulted in the joint conduct or disposition of official [FCC] business." Both the Senate and House Reports state that panels authorized "to conduct hearings on behalf of the agency" must open their meetings to the public. See page 22, *supra*. And the Senate Report says that, "[i]n addition to business meetings of the agency, [the term 'meeting'] includes hearings and meetings with the public." S. Rep. 94-354, *supra*, at 18. The court of appeals cited these three passages and held that the FCC "ha[d] advanced no reason to distinguish the [Consultative Process discussions] from 'hearings' or 'meetings with the public'" (Pet. App. 38a).

The court of appeals "read too much into these scattered bits of legislative history." *Pennhurst State School* v. *Halderman*, 451 U.S. 1, 20 (1981). To begin with, there is a vast difference between "agency hearings" and the international consultations involved here. Hearings are usually formal, focus upon a particular problem or proposal, and are generally open to the pub-

lic.[15] Earlier drafts of the Sunshine Act had defined "meeting" explicitly to include "meetings to conduct hearings,"[16] and both Reports suggest (see pages 22-23, *supra*) that the "conduct of hearings" should be read in pari materia with "the submission of preliminary decisions," *i.e.*, as exemplifying formal and decision-oriented agency action.

Nor does the statement that "meeting" includes "meetings with the public" justify the court of appeals' result. The court viewed that statement (see Pet. App. 42a-43a) as establishing a virtual per se rule that discussions with outsiders are "meetings" for Sunshine Act purposes. That plainly was not the intendment of the Senate Report. The Report surely meant to signify no more in the quoted passage than it did in a passage three pages earlier, where it stated that "meeting" includes "meetings of [an agency] when agency staff or outside individuals *are also present*." S. Rep. 94-354, *supra*, at 15 (emphasis added). Both passages indicate (quite properly) that, if an agency gathering otherwise qualifies as a "meeting" under Section 552b(a)(2), the "meeting" is no less a "meeting" because outside parties happen to be there. The passages cannot be read to suggest that the attendance vel non of outside parties is a relevant consideration in determining whether the gathering is a "meeting" to begin with. Indeed, any such suggestion would contradict Section 552b(a)(2), which says that the only persons whose attendance is relevant are "agency members."

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[15] See, *e.g.*, 47 U.S.C. 154(j) (FCC hearings open to the public upon request, but may be closed to protect secret national defense information); cf. 5 U.S.C. 552b(c)(1) (Sunshine Act exception for similar information).

[16] See, *e.g.*, S. 3881, 92d Cong., 2d Sess. § 1(a) (1972); S. 261, 93d Cong., 1st Sess. § 201(a) (1973); S. 5, 94th Cong., 1st Sess. § 201(a) (1975); H.R. 5075, 94th Cong., 1st Sess. § 4(a) (1975).

D. The Consultative Process sessions were not "meetings of the FCC"

The Sunshine Act's open-meeting requirements apply only to "meeting[s] of an agency" (5 U.S.C. 552b(b)). Even if the Consultative Process sessions were "meetings," therefore, they would not be covered by the Act unless they were also shown to be "meetings of [the FCC]." The circumstances under which the sessions were held make it clear that they cannot be so denominated.

The structure of the Sunshine Act shows that a meeting does not become a "meeting of [the] agency" merely because some agency members happen to be present. Rather, the Act's operative provisions uniformly proceed on the assumption that "an agency meeting" (5 U.S.C. 552b(c)) is a meeting that is run by, and under the control of, the agency in question. The procedures for closing a meeting, for example, presume that the agency is in a position unilaterally to decide, "by recorded vote," whether the meeting will be open to the public (5 U.S.C. 552b(d)(1) and (2)). The Act permits an agency to "provide by regulation for the closing of [certain] meetings," evidently assuming that the agency's regulations will bind all concerned (5 U.S.C. 552b(c)(4)). The Act's notice provisions are predicated on the assumption that the agency is in a position to prescribe the meeting's time, place, and subject matter, and to dictate any changes therein "by a recorded vote," solely by reference to whether "agency business so requires" (5 U.S.C. 552b(e)(1) and (2)). The Act states that "[t]he agency shall make promptly available to the public" the transcript of any closed meeting, evidently assuming that the agency has discretion to make such disclosure unilaterally (5 U.S.C. 552b(f)(2)). And the Act assumes that the "presiding officer" of the meeting will be an agency member (5 U.S.C. 552b(f)(1)).

The Consultative Process sessions were plainly not run by the attending Commissioners or within their unilateral control. Those sessions were hosted by foreign governments and were held on foreign soil. They were variously attended by representatives of six or more foreign countries. The foreign attendees were officials of national telecommunications agencies; they outnumbered the attending Commissioners and equalled them in rank. Under these circumstances, the attending Commissioners were in no position to decide unilaterally whether the sessions would be open or closed, to decree that the sessions would be governed by FCC regulations, or to dictate changes in their format as "[FCC] business * * * require[d]." Indeed, any such attempt would have implied that the gatherings were subject to American regulatory constraints, whereas the whole point of the Consultative Process was to enable "foreign entities [to] participate without being subjected 'to U.S. regulatory jurisdiction in fact or appearance.'" Pet. App. 79a, quoting *In re AT&T Co.*, 73 F.C.C.2d 248, 254 (1979). Faced with foreign objections, the Commissioners would have had to choose between forgoing the sessions or violating the Sunshine Act. This Hobson's choice would in effect have converted the Act's procedural rules into a substantive restriction on FCC action, contrary to Congress's explicit intent not to "change[ ] the substantive laws governing * * * any agency." S. Rep. 94-354, *supra*, at 1.

Common sense likewise suggests that international meetings attended by representatives of this country are not "meetings of [the] agency" in question. Congress surely recognized that foreign nations' progress toward "government in the sunshine" was less precipitous than ours, and surely realized that foreign officials would bristle at being subjected to such peculiarly American rules. Congress generally acts circumspectly

when extending the jurisdiction of our laws extraterritorially, and there is nothing in the statute or its legislative history to suggest such a design here. The exceptions to the Act's openmeeting requirements are couched in terms of United States law (see, *e.g.*, 5 U.S.C. 552b(c)(1), (3) and (10)), and would thus prevent foreign participants from demanding closure of a session, even though they might allege policy grounds identical to those underlying the statutory exceptions. These considerations counsel against regarding the Dublin, Ascot, and Madrid multinational gatherings as "meetings of the FCC."[17]

Finally, strong considerations of policy and practicality militate against the court of appeals' result. Its decision, taken as a whole, gives the words "meeting of an agency" no coherent denotation. In limiting the term only by such vague strictures as the requirement that discussions "involve agency business of the first import" or "play an integral role in the [agency's] policy-making processes" (Pet. App. 38a), the opinion gives the courts vast, ad hoc discretion to expand the Act's

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[17] It is of course true, as the court below noted, that "the mere setting of a gathering is not determinative" of its status as a Sunshine Act "meeting" (Pet. App. 40a n.158, quoting S. Rep. 94-354, *supra*, at 18). The Senate Report indicates that "[d]iscussions held in the board room or the Chairman's office are not the only gatherings covered," and that "[c]onference telephone calls and meetings outside the agency are equally subject to the bill if they * * * meet the requirements of this subsection." S. Rep. 94-354, *supra*, at 18-19. But we are not contending that the geographical location of the Consultative Process sessions, per se, put them outside the Act's scope. We submit, rather, that the totality of the circumstances under which the sessions were held—including the facts that they took place outside U.S. regulatory jurisdiction and were attended by foreign officials who outnumbered and had equal status with the attending FCC members—shows that the sessions could not have been controlled by, and were thus not "meetings of," the agency.

coverage in unpredictable ways. A "meeting" will be deemed to have occurred whenever a court concludes that something meaningful was said.

More importantly, the decision below will severely impede agency consultations with their foreign counterparts, in defiance of Congress's intention that the Sunshine Act not impose substantive restrictions on agency action. Rapid technological advances have heightened the need for international coordination in many regulatory fields, from banking and telecommunications to shipping and aviation. Such coordination demands that administrators from different countries understand each other's objectives and strategies, as well as the technical, economic, legal and political constraints under which they work. This mutual understanding is often achieved best through face-to-face conferences at which officials engage in free-wheeling, wide-ranging, and informal discussions. If such gatherings must be open to the public, be recorded or transcribed, and be governed by a formal agenda, their utility—assuming that foreign representatives are willing to participate at all—will be greatly reduced.[18] This will not mean more government in the sunshine. It will mean more global misunderstanding and less effective regulatory coordi-

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[18] As noted above (see pages 10-11, *supra*), the October 1980 Consultative Process session, held in Madrid, was taped pursuant to the district court's order. The European attendees objected strenuously (J.A. 177), and the gathering proved far less useful than its predecessors, with the Europeans abstaining from candid discussion and "confin[ing] themselves instead to listening to the U.S. statement of position" (*id.* at 178). Although the Consultative Process has not been terminated entirely (see ITT's Br. in Opp. 13), sessions held since Madrid have dealt only with facilities planning, to the exclusion of the topics—new carriers and services, and the desirability of increased competition—that were added to the agenda at Dublin. The decisions below, in short, have caused cessation of the discussions that gave rise to this litigation.

nation. No one will benefit, except regulatees like respondents, who will have found an ingenious new way to thwart the administrative process.

II. THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER ITT'S ULTRA VIRES CLAIM

ITT alleged in its complaint, not only that closure of the Consultative Process violated the Sunshine Act, but also that the attending Commissioners' participation in those discussions was "unlawful and *ultra vires*, and in excess of the authority conferred * * * by the Communications Act" (J.A. 68). The court of appeals held that the district court had jurisdiction of the latter count, even though exclusive jurisdiction to review FCC orders is vested in the courts of appeals, even though ITT had presented an identical (or virtually identical) ultra vires argument to the FCC in its petition for rulemaking, and even though the FCC's order denying that rulemaking petition was simultaneously before the court of appeals for review.

The court of appeals' holding is an egregious departure from settled principles of administrative law. It undermines the statutory review procedure that Congress has mandated for review of FCC action. And it permits parties to subject administrative orders to collateral attacks that are duplicative, that waste judicial and agency resources, and that threaten to produce conflicting results.

A. The courts of appeals have exclusive jurisdiction to review FCC orders, and this exclusivity is based on sound considerations of policy and practicality

It is undisputed that, under the special statutory review provisions set forth in the Communications Act, exclusive jurisdiction to review final FCC orders lies in the courts of appeals. 28 U.S.C. 2342(1); 47 U.S.C.

402(a).[19] While the district courts retain residual jurisdiction to review final agency action under 28 U.S.C. (Supp. V) 1331 and the Administrative Procedure Act, they may exercise such jurisdiction only "in the absence or inadequacy" of special statutory review. 5 U.S.C. 703. See 5 U.S.C. 704 (permitting district court review of agency action where "there is no other adequate remedy in a court"). This Court has emphasized that, "where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, these procedures are to be exclusive." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 420 (1965) (citing cases). Accord, *e.g.*, *Port of Boston Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-70 (1970); *City of Peoria* v. *General Electric Cablevision Corp.*, 690 F.2d 116, 119, 121-122 (7th Cir. 1982); *City of Rochester* v. *Bond*, 603 F.2d 927, 934 (D.C. Cir. 1979). The courts have repeatedly rejected litigants' attempts to evade these procedures by bringing district court actions that raise "collateral[ ] attack[s]" on administrative orders. *Whitney National Bank*, 379 U.S. at 421-422; *Gaunce* v. *deVincentis*, 708 F.2d 1290, 1292-1293 (7th Cir. 1982) (per curiam) (citing cases). District court jurisdiction is precluded where "the questions raised by the [plaintiffs] in the District Court * * * are cognizable by the [agency]," and are thus capable of being presented to the court of appeals

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[19] Section 402(a) of Title 47 provides that "[a]ny proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter * * * shall be brought as provided by and in the manner prescribed" in 28 U.S.C. 2342(1). The latter section provides that the courts of appeals have "exclusive jurisdiction to enjoin, set aside, suspend [or] determine the validity of * * * all final orders of the Federal Communication Commission * * *."

on statutory review. *Whitney National Bank*, 379 U.S. at 417.

The statutory review procedure serves important policy objectives. It ensures that challenges to administrative action are presented to the agency before they are presented to the courts. It guarantees that agency action will be delayed or set aside only by an appellate panel, not by a single district court judge. It ensures review by a tribunal with far greater cumulative expertise about sometimes arcane regulatory matters. It streamlines the administrative process by removing a layer of judicial review. It reinforces the rule that agency decisions should be reviewed on the administrative record, not on the basis of de novo judicial factfinding. It prevents interference with agency work and harassment of agency staff through time-consuming discovery requests and trial court proceedings. And it prevents "unnecessary duplication and conflicting litigation" about the same issue. *Whitney National Bank*, 379 U.S. at 422. See generally *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 Harv L. Rev. 980, 983 (1975).

B. ITT's ultra vires claim could have been reviewed by the court of appeals under 47 U.S.C. 402(a), and the district court thus had no jurisdiction to consider it

The court below acknowledged that exclusive jurisdiction to review FCC orders is generally committed to the courts of appeals (Pet. App. 13a). Yet it held that concurrent district court jurisdiction was nevertheless appropriate here, for two principal reasons. Neither reason justifies that holding.

1. First, while conceding that "[a] strong presumption against concurrent district court jurisdiction would be appropriate if the issues presented by ITT's rule-

making petition and its *ultra vires* count were indeed identical," the court of appeals believed that the issues were actually "very different" (Pet. App. 14a). ITT's rulemaking petition, as the court read it, "asked the Commission for a declaration of the nature of its authority * * * and argued that 'negotiation' [was] outside the scope of that authority." ITT's complaint, on the other hand, was viewed as "assert[ing] that the Commission, irrespective of what it acknowledges as the proper scope of its authority, has *in fact* secretly exceeded that authority and will not admit to having done so" (*ibid.*; emphasis in original).

This exercise in hair-splitting cannot withstand analysis. ITT in its rulemaking petition quite plainly presented, among other arguments, an ultra vires argument identical to that set forth in its district court complaint. And even if it were possible to perceive some distinction between the two claims, it would be a distinction without a difference for purposes of answering the jurisdictional question posed here.

ITT's rulemaking petition expressly contended that the FCC "lacks authority to participate in" Consultative Process discussions of new carriers and services. See J.A. 32-33, 42, 46, 51 and 68.[20] The petition and the

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[20] The petition begins by saying that "ITT Worldcom questions the wisdom of such proposed activities [*i.e.*, Consultative Process discussions of new carriers and services], and contends that the Commission lacks authority to participate in them" (J.A. 33). The petition ends by asserting that "the Commission must, at the threshold, face the issue of whether its contemplated course is a permissible one" (*id.* at 46). ITT described as "the primary underlying issue" the FCC's asserted "lack of authority for the course upon which it is apparently embarking" (*id.* at 51). ITT urged the Commission to adopt procedural rules only in the event that it "determine[d], on the basis of [ITT's proposed] policy evaluation, that it may proceed with an exchange of information with foreign administrations" (*id.* at 42). ITT's district court complaint itself acknowledged that its

complaint cited the same evidence—a series of statements by FCC representatives—in support of this ultra vires charge. Compare J.A. 35 n.2 and 52 with J.A. 64-68. The petition and the complaint sought essentially the same, prospective, relief—a prohibition (whether effected by agency rule or court injunction) against the FCC's engaging in ultra vires conduct at future Consultative Process sessions. Compare J.A. 47-48 with J.A. 70-71.[21] The Commission itself interpreted the petition to present an ultra vires claim, summarizing the first issue raised by ITT as "whether the Commission has engaged in 'negotiations'" (Pet. App. 77a), and concluding that "ITT's argument, reduced to its essentials, is that the Commission lacks authority to engage in discussion with foreign governments and telecommunications entities" (*id.* at 71a). And the Commission, in

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rulemaking petition "questioned the Commission's authority to engage in the negotiations and discussions with foreign governments" (*id.* at 68).

[21] In its brief in the court of appeals, ITT tried to articulate a distinction between the modes of relief sought, arguing that its petition was "entirely prospective in nature" and did not "ask the FCC to determine the legality of its past actions," whereas its complaint "asked the District Court to review the legality of past actions the Commission had actually taken at the closed meetings" (C.A. Br. 39-40). ITT urges the same distinction here. Br. in Opp. 26. This post hoc distinction is illusory. ITT did not ask the district court to grant (and the district court had no power to grant) any retrospective relief; rather, ITT sought declaratory and injunctive relief as to future Consultative Process sessions. See J.A. 70-71. It is of course true that both the FCC and the district court, in considering ITT's request for prospective relief, would have had to examine the attending Commissioners' past conduct to determine, as a general matter, the permissible scope of FCC activity. But this does not change the prospective character of the relief sought. ITT has never contended that previous Consultative Process sessions from which it was excluded differ in any material respect from the sessions the FCC contemplated attending in the future.

its order denying the petition for rulemaking, comprehensively addressed ITT's ultra vires contention, concluding (*id.* at 82a) that the Consultative Process discussions were a "necessary and natural corollary" of its statutory authority to regulate "foreign commerce in communication by wire and radio" (47 U.S.C. 151).

Even if it were possible to discern some distinction between the ultra vires argument raised in ITT's rulemaking petition and the ultra vires claim presented in its district court complaint, the jurisdictional outcome would be the same. Any such variation was wholly a result of the way ITT chose to frame its pleadings. But this Court has emphasized that, where a statute vests exclusive jurisdiction to review agency action in the courts of appeals, nice distinctions of pleading will not enable collateral attacks to be brought before a district judge. In *Whitney National Bank*, the Court expressly ruled such formal distinctions irrelevant; it held that the district court was without jurisdiction because "the thrust of [the] complaint" (379 U.S. at 417) and "the heart of [the] argument" (*id.* at 418, 423) raised questions cognizable by the agency and exclusively reviewable in the courts of appeals.[22]

There can be no question here that "the thrust" of ITT's complaint and "the thrust" of its rulemaking petition were substantially identical. Each challenged the Commissioners' authority to discuss new carriers and services at the Consultative Process. If ITT enter-

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[22] The complaint in *Whitney National Bank* requested an injunction against the Comptroller of the Currency's issuance to a newly-organized bank of a certificate of authority to do business (379 U.S. at 414, 417). This Court concluded, however, that the plaintiffs' "quarrel[,] in actuality," was with the Federal Reserve Board's approval of a bank holding company that included the newly-organized bank as a subsidiary. See *id.* at 417-419. The Court accordingly held that the district court lacked jurisdiction of the injunctive action and required the plaintiffs to submit their objections initially to the Board (*id.* at 419-423).

tained any doubt about its ability to have this challenge resolved in the rulemaking proceeding, it could have moved the FCC for a declaratory ruling (see 47 C.F.R. 1.2) concerning the legality of the attending Commissioners' conduct, and judicial review of that ruling would likewise have been available in the court of appeals.[23] What ITT could not do was circumvent these statutory review procedures by crafting razor-thin distinctions between the claim it asserted before the Commission and the claim it asserted before the district court.

In sum, by alleging that the FCC's participation in the Consultative Process was "unlawful and *ultra vires*, and in excess of the authority conferred * ** by the Communications Act," ITT's complaint asserted a claim identical, or virtually identical, to that presented in its rulemaking petition. The FCC had fully addressed that claim in its order denying rulemaking, the order denying rulemaking was pending before the court of appeals, and the court of appeals' jurisdiction to review that order was, under 47 U.S.C. 402(a), exclusive. Accordingly, the district court lacked jurisdiction of the ultra vires count.[24]

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[23] For cases involving appellate review of FCC declaratory rulings, see *Chisholm* v. *FCC*, 538 F.2d 349, 364-365 (D.C. Cir.), cert. denied, 429 U.S. 890 (1976); *New York State Broadcasters' Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969). At least one court of appeals has cited the availability of a declaratory ruling under 47 C.F.R. 1.2 as a basis for foreclosing district court consideration of issues cognizable by the FCC. See *City of Peoria*, 690 F.2d at 121.

[24] Even if ITT's two claims were genuinely heterogeneous, it would not follow that the district court would have jurisdiction to proceed to the merits of the claim before it. In determining whether district court jurisdiction lies, the question is not whether the complaint tenders issues that have in fact been presented to the agency. The question, rather, is whether the "complaint tenders issues cognizable by the [agency]." *Whitney*

2. The court of appeals' second reason for sustaining district court jurisdiction was that "*de novo* judicial factfinding [was] necessary for a fair examination of the disputed issues" (Pet. App. 14a). The court found the rulemaking record "manifestly inadequate" and concluded that "ITT's colorable *ultra vires* claim [could] therefore be tested only through the kind of independent, *de novo* factfinding appropriate in the district court" (*id.* at 15a).

This reasoning stands administrative procedure on its head. If an appellate court "finds itself unable to exercise informed judicial review because of an inadequate administrative record," the proper course is to "remand [the] case to the agency for further consideration." *Harrison* v. *PPG Industries, Inc.* 446 U.S. 578,

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National Bank, 379 U.S. at 419. Under the doctrine of "primary jurisdiction," a litigant does not have an election as to the forum in which he will raise a matter within the compass of an agency's regulatory expertise; rather, he must permit the agency to "have first crack at" the problem's resolution. *City of Peoria*, 690 F.2d at 120-121. Accord, *e.g.*, *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 295-306 (1973); *Writers Guild of America, Inc.* v. *American Broadcasting Companies, Inc.*, 609 F.2d 355, 365-366 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980). See generally L. Jaffe, *Judicial Control of Administrative Action* 121-135 (1965). If an agency has primary jurisdiction over an issue, the district court must either dismiss the complaint (*e.g.*, *Whitney National Bank*, 379 U.S. at 421, 426; *Far East Conference* v. *United States*, 342 U.S. 570, 574, 577 (1952)), or stay proceedings before it pending completion of the related agency action (*e.g.*, *Ricci*, 409 U.S. at 291; *City of Peoria*, 690 F.2d at 122). Where there are no issues in the district court other than those properly referrable to the agency, the agency is capable of offering the full relief requested, and the agency's action will be exclusively reviewable in the court of appeals, dismissal of the complaint is usually the proper course. See L. Jaffe, *supra*, at 137-141 (discussing cases). Thus, even if ITT had not raised the ultra vires point in its rulemaking petition, dismissal of the ultra vires count would still have been proper under the "primary jurisdiction" doctrine.

593-594 (1980). An agency is not foreclosed from dealing with a question merely because a claim is made (as here) that it has exceeded its statutory authority. See, *e.g.*, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). Nor is a remand for further factfinding inappropriate merely because a claim is made (as here) that the agency has been guilty of ex parte contacts or other impropriety.[25] If, following a remand for further factfinding, the appellate court still finds the agency record inadequate, it may refer the case, under 28 U.S.C. 2347(b)(3), to a district court judge, who will act as special master in accordance with the court of appeals' specific guidelines and instructions.[26] Whatever procedure is adopted, the objective is to create a record adequate for judicial review—judicial review that, under the governing statutes, is committed exclusively to the courts of appeals. Neither law nor logic supports the notion that an inadequte administrative record, in and of itself, can somehow serve to abrogate the statutory review procedure and invest a district court with jurisdiction it would not otherwise have. Jurisdiction cannot so lightly be conferred.[27]

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[25] See, *e.g.*, *PATCO* v. *FLRA*, 672 F.2d 109 (D.C. Cir. 1982); *HBO, Inc.* v. *FCC*, 567 F.2d 9, 58-59 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); *Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 221 (D.C. Cir. 1959). See also *Writers Guild of America*, 609 F.2d at 363-364, 366 (holding that FCC had primary jurisdiction over claim of official misconduct by FCC Commissioner).

[26] See, *e.g.*, *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, No. 80-6088 (9th Cir. Dec. 8, 1983), slip op. 5728-5729; *Lake Carriers' Ass'n v. United States*, 414 F.2d 567 (6th Cir. 1969). See also *City of Rochester*, 603 F.2d at 938 (suggesting transfer under 28 U.S.C. 2347(b)(3) "when petitioner's allegations necessitate factfinding beyond the competence of the agency").

[27] The court of appeals' reliance (Pet. App. 14a-15a n.52) on cases like *Investment Company Institute* v. *Board of Gover-*

3. The court of appeals' decision to remand the ultra vires count to the district court is particularly problematic when viewed in conjunction with its decision simultaneously to remand the rulemaking petition to the FCC. The court acknowledged that both tribunals would be required on remand to investigate precisely the same thing—"the nature of the [attending Commissioners'] off-the-record activities" at the Consultative Process (see Pet. App. 15a n.54). The court also acknowledged that this "double remand" was "fraught with the potential for duplication, conflicting resolutions, and further delay." *Id.* at 51a. Yet the court's suggested way out of this dilemma—that the Commission "stay[] further action on ITT's rulemaking petition pending the district court's resolution of the *ultra vires* issue" (Pet. App. 51a-52a)—only illustrates the court's cumulative errors. That suggestion inverts the doctrine of "primary jurisdiction" (see pages 44-45 n.24, *supra*) and flouts this Court's decision in *Whitney National Bank*. The Court there noted, as did the court below, that concurrent district court jurisdiction would create the potential for "unnecessary duplication" and "conflicting determinations" (379 U.S. at 422). But the Court's solution was not to stay the agency proceedings and order the matter determined in the first instance by the district court. Its solution, rather, was to order dismissal of the district court complaint and have "the

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nors of the Federal Reserve System, 551 F.2d 1270, 1278 (D.C. Cir. 1977), and *Deutsche Lufthansa Aktiengesellschaft* v. *CAB*, 479 F.2d 912, 916 (D.C. Cir. 1973), is misplaced. Those cases hold only that, where an agency takes certain kinds of informal action, the existence vel non of an adequate record is a useful factor in determining whether such action is a reviewable "order" for purposes of a direct review statute. There is no question here that the FCC's denial of ITT's petition for rulemaking is an "order." Indeed, ITT petitioned for review of that order and the court below assumed jurisdiction.

determination of the plan's propriety [be made] in the first instance" by the agency (*id.* at 421).

In short, neither rationale advanced by the court of appeals[28] justifies its decision to permit concurrent district court jurisdiction. That holding is an unprecedented departure from established principles of administrative law, and offers regulated parties yet another tool for disrupting the administrative process[29] by bringing time-consuming collateral attacks on agency decisions.

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[28] The court of appeals also reasoned (Pet. App. 16a) that "subsequent judicial or administrative proceedings would not likely provide an adequate remedy for the Commission's alleged misconduct" because that misconduct "[was] not calculated to result in a final order, but rather to lead to unreviewable action by foreign administrations." This argument adds nothing to, but is merely derivative of, the two arguments discussed above. If, as we contend, ITT's ultra vires argument was in fact presented (or was capable of being presented) to the FCC in a petition for rulemaking or motion for declaratory ruling (see pages 41-44, *supra*), to be followed by statutory review under 47 U.S.C. 402(a), ITT had a completely adequate remedy for the Commission's alleged misconduct, and it is immaterial that the Consultative Process would not itself yield any "final orders" subject to judicial review.

[29] For example, in *Municipal Electric Utilities Ass'n* v. *Regan*, Civ. No. 83-0595 (D.D.C. 1983), a suit alleging that the Federal Energy Regulatory Commission relied on ex parte communications in taking certain action, plaintiffs have predicated jurisdiction in large measure on the court of appeals' reasoning below. The jurisdictional question has arisen in at least two challenges to FCC action since the opinion below was issued. See *California Ass'n of the Physically Handicapped, Inc.* v. *FCC*, *supra*; *Faith Center, Inc.* v. *FCC*, Civ. No. 83-1463 (D.D.C. filed May 23, 1983).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 402(a) of the Communications Act, 47 U.S.C. 402(a), provides:

> Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

Section 2342 of 28 U.S.C. provides in pertinent part:

> The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—
>
> (1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47; * * *

The Government in the Sunshine Act, 5 U.S.C. 552b, provides in pertinent part:

> (a) For purposes of this section—
>
> (1) the term "agency" means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;
>
> (2) the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business * * *.
>
> * * * * *
>
> (b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.